

## DEPARTMENT OF STATE REVENUE

04-20190422.LOF

**Letter of Findings Number: 04-20190422**  
**Sales Tax**  
**For Tax Years 2015-2017**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

**HOLDING**

S-corporation protested that the Department used incorrect data resulting from business type misclassification. S-corporation did not provide sufficient documentation to verify its protest. Therefore, S-corporation did not meet the burden of proving the proposed assessments wrong.

**ISSUES****I. Sales Tax—Additional Sales.**

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-2-1; *Indiana Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012).

Taxpayer protests proposed assessments for additional sales tax.

**II. Tax Administration—Penalty.**

**Authority:** IC § 6-8.1-5-4; IC § 6-8.1-10-1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of penalties.

**STATEMENT OF FACTS**

Taxpayer, an S-corporation, operates a retail business with gasoline sales and an attached convenience store. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer underreported taxable sales for the tax years 2015, 2016, and 2017. The Department therefore issued proposed assessments for sales tax, penalties, and interest for those years. Taxpayer protested the imposition of sales tax, penalties, and interest. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as needed.

**I. Sales Tax—Additional Sales.****DISCUSSION**

Taxpayer protests the Department's proposed sales tax assessments for tax years 2015 through 2017. The Department found that Taxpayer failed to keep daily z tapes from its register to verify reported exempt sales. The Department therefore used alternate methods to determine Taxpayer's total purchases, total sales, and exempt sales. Taxpayer disagrees with the Department's calculations and results. Specifically, Taxpayer protests that the Department erroneously classified Taxpayer as a food and beverage store, rather than as a gas station, which carries a higher Cost of Goods Sold ("COGS") percentage. Had the Department done so, Taxpayer argues, the resulting liabilities would be wholly eliminated.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the

person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 485 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state. (Emphasis added).*

Therefore, retail merchants are required to collect sales tax on retail transactions unless the transaction is exempt from sales tax.

Next, the Department refers to IC § 6-8.1-5-1(b), which states:

*If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.* The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail. *(Emphasis added).*

On tax records, the Department refers to IC § 6-8.1-5-4(a), which states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. *The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks. (Emphasis added).*

In the instant case, the Department determined that Taxpayer's documentation was insufficient to determine taxable and exempt sales. As explained above, Taxpayer did not supply daily sales records such as cash register z tapes. Rather, Taxpayer provided purchase invoices and bank statements. The Department determined that these records failed to verify reported sales. Therefore, the Department used the best information available to determine taxable and exempt sales.

The Department reviewed the invoices and calculated Taxpayer's taxable sales by using Taxpayer's actual purchases combined with a COGS (also referred to as "Cost of Sales") percentage for food and beverage stores found on "BizStats.com" ("BizStats"). The Department used the BizStats COGS numbers to determine the average markup which Taxpayer applied to the goods it purchased and sold, and so determined total taxable sales and total exempt sales. Those calculations led to the conclusion that Taxpayer had additional taxable sales and additional sales tax due for the tax years at issue.

Taxpayer protests that the BizStats category used by the Department is the wrong category for its business. Taxpayer argues that it should be classified as a gasoline station. Taxpayer refers to its federal tax return, which lists 447110 as the North American Industry Classification System ("NAICS") number. This number, Taxpayer argues, is for gasoline retailers. The Bizstats COGS for gasoline retailers is much higher than for food and beverage retailers. This, Taxpayer argues, results in inaccurate calculations. If the correct Bizstats category was used, Taxpayer argues, the Department's assessments would be wholly eliminated.

The Department disagrees with Taxpayer's argument. First, Taxpayer provided no sales documentation supporting its claims. Second, the Department's audit reflects food and beverage purchases common in convenience stores. Finally, in reviewing the NAICS system, the Department found 447110 applies to "Gasoline stations (including convenience stores w/ gas)." In light of the multiple NAICS number definitions, the Department

is not convinced by Taxpayer's argument.

In conclusion, the Department was correct to use the best information available to determine Taxpayer's total and taxable sales for the tax years 2015, 2016, and 2017, as provided by IC § 6-8.1-5-1(b), since Taxpayer failed to keep documents it was required to keep under IC § 6-8.1-5-4(a). Since Taxpayer provided no sales documentation supporting its position, it does not meet the burden of proving the proposed assessments wrong under IC § 6-8.1-5-1(c).

## FINDING

Taxpayer's protest is denied.

## II. Tax Administration—Penalty.

## DISCUSSION

Taxpayer protests the imposition of penalties and interest. Penalties are waived if the taxpayer shows that failure to pay the full tax amount was due to reasonable cause and not negligence.

[45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer protests the Department's penalty assessment. The Department disagrees. Taxpayer failed to keep sales records as required under IC § 6-8.1-5-4(a), and sales tax remains due. IC § 6-8.1-10-1(e) prevents the Department from waiving interest. Taxpayer has not affirmatively established that it exercised ordinary business care in this case. Therefore, waiver of penalties is not warranted under [45 IAC 15-11-2](#)(c).

## FINDING

Taxpayer's protest is denied.

## SUMMARY

Taxpayer's protests of the proposed sales tax and penalty assessments are denied.

August 14, 2019

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An [html](#) version of this document.